STATE OF MICHIGAN

COURT OF APPEALS

SEIDMAN & COMPANY, INC.,

Plaintiff-Appellant,

v

MICROHEAT, INC.,

Defendant-Appellee.

UNPUBLISHED
March 27, 2007

No. 272437
Oakland Circuit Court
LC No. 2006-072694-CK

Before: Servitto, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant on plaintiff's breach of contract claim.[1] We reverse the grant of summary disposition with regard to that claim, and remand this case for further proceedings. We decide this case without oral argument under MCR 7.214(E).

I. FACTS

In connection with a "Letter Agreement" entered into between the parties, plaintiff identified Webasto AG and affiliated companies (collectively referred to as "Webasto") as a potential "Investor" in defendant. At a later point, Webasto began purchasing products from defendant for re-sale, and eventually entered into a sales agreement with defendant. Defendant has never paid plaintiff a fee under the Letter Agreement, taking the position that its sale of products to Webasto does not constitute an investment by Webasto in defendant that would trigger a duty to pay such a fee under the Letter Agreement. Plaintiff brought suit claiming, in relevant part, that defendant breached the Letter Agreement by failing to pay plaintiff a fee based on its dealings with Webasto.

Plaintiff argues that the trial court erred by granting summary disposition to defendant. We agree.

[1] Although plaintiff asserted additional claims in its complaint, on appeal it challenges only the grant of summary disposition as to the breach of contract claim.

II. STANDARD OF REVIEW

The trial court stated that it examined evidence presented to it in granting summary disposition to defendant, so it is apparent that the trial court effectively granted summary disposition under MCR 2.116(C)(10). We review a grant of summary disposition under MCR 2.116(C)(10) de novo. *Greene v A.P. Products, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). The documentary evidence submitted by the parties is viewed in the light most favorable to the party opposing the motion. *Id*. Summary disposition under MCR 2.116(C)(10) is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. Also, the proper interpretation of a contract is reviewed de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

III. ANALYSIS

As an initial matter, the trial court erred to the extent that it relied on *Securities & Exch Comm v W.J. Howey Co*, 328 US 293; 66 S Ct 1100; 90 L Ed 1244 (1946), to define the term "investment" as used in the Letter Agreement. In that case, the United States Supreme Court defined an "investment contract" for purposes of the federal Securities Act as meaning "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." *Id*. at 298-299. However, investment (unlike the term "investment contract") is a commonly used term, not a legal term of art. The present case involves an issue of contract interpretation, not construction of statutory terminology. Thus, there was no sound reason for the trial court to use authority construing the term "investment contract" for purposes of a federal statute to define the meaning of the commonly used term investment. Rather, words in a contract should be given the "plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory*, *supra* at 464.

Critical to this case is whether the language of the Letter Agreement is ambiguous with regard to plaintiff's entitlement to a fee from defendant. "A contract is ambiguous if its provisions may reasonably be understood in different ways." *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001). The Letter Agreement provides that plaintiff's entitlement to a fee from defendant is triggered by the closing of a "Transaction." The Letter Agreement defines a "Transaction" as "an investment by the Investor [Webasto] in [defendant] by means of a cash investment, merger, consolidation, reorganization, spin-off, recapitalization, or restructuring, joint venture, tender or exchange offer, purchase or sale of assets, or other similar transaction or series of transactions." As will be explained, this language is ambiguous because examples that it provides as constituting "investment by the Investor in" defendant would not constitute an investment in defendant under the common usage of the language. However, the Letter Agreement includes no clear definition or explanation of the scope of what it contemplates as constituting making an investment in defendant.

To begin, one would ordinarily refer to an investor making an investment *in* a company only if that investor acquired a stock or similar capital interest in the company. For example, it is common to refer to a person's act of buying stock in a company as investing in that company. In contrast, the purchase of goods from a company, even for resale, is not ordinarily referred to as an investment in that company. As an example, if a retailer buys a quantity of a product from a wholesaler to sell in the retailer's stores, the retailer would not ordinarily be referred to as making an investment in the wholesaler. Accordingly, under the common understanding of

making an investment in a company, Webasto's purchase of goods from plaintiff, even on an ongoing basis with exclusive distribution rights in many locations, would not constitute Webasto making an investment in defendant because it does not involve Webasto acquiring a capital interest in defendant.

However, some of the examples of means by which Webasto could be considered as making an investment in defendant under the Letter Agreement plainly could not fall within the common understanding of Webasto making an investment in defendant. One example provided is a "joint venture." A joint venture between Webasto and defendant would not fit within the common understanding of Webasto making an investment in defendant. A joint venture consists of, among other elements, a joint undertaking of a single project for profit. *Kay Investment Co, LLC v Brody Realty I, LLC*, ___ Mich App ___; ___ NW2d ___ (Docket No. 263549, pub'd December 28, 2006, at 9:15 a.m.), slip op at 3-4. Thus, it is apparent that by entering a joint venture parties do not obtain a capital interest in each other, but rather share an interest in the single project they have jointly undertaken. Accordingly, in the ordinary usage of the language, while one might say that joint venturers are making an investment *with* each other, one would not state that Webasto made an investment *in* defendant if it undertook a joint venture with it. However, because the Letter Agreement lists a joint venture as one means by which Webasto could make an investment in defendant, this suggests that the parties contemplated a broader understanding of the scope of Webasto making an investment in defendant than ordinary use of the language would indicate.[2]

Similarly, the Letter Agreement provides for a "purchase or sale of assets" as a means by which Webasto could invest in defendant. However, as with a joint venture, the purchase or sale of assets would not involve Webasto acquiring a capital interest in defendant as a common understanding of Webasto investing in defendant would require. Despite the use of examples of Webasto investing in defendant that are inconsistent with the common understanding of a party investing in another party, the Letter Agreement does not directly define what would constitute Webasto making an investment in defendant for purposes of the Agreement, but only provides examples of means by which such investment might be made. Thus, the Letter Agreement is ambiguous with regard to the meaning of what constitutes an investment by Webasto in defendant, and therefore what constitutes a "Transaction," because the use of examples of a party investing in another party that are broader than the ordinary understanding of such investment and the lack of a definition renders the Letter Agreement subject to different reasonable understandings. *Universal Underwriters Ins Co, supra* at 496.

"[T]he meaning of an ambiguous contract is a question of fact that must be decided by the jury." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003).

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[2] It is not relevant to this analysis whether defendant and Webasto ever actually entered any joint venture. The point is simply that the inclusion of a joint venture, which would not in the common usage involve a party making an investment in another party, as one means by which Webasto could have invested in defendant, reflects that the parties had a broader understanding of Webasto investing in defendant than the ordinary meaning of a party investing in another party.

Given the lack of a clear definition of what constitutes an investment by Webasto in defendant for purposes of the Letter Agreement, coupled with the indication from the agreement that a broad interpretation was intended in this regard, a reasonable jury could conclude that Webasto was investing in defendant within the contemplation of the Agreement by buying products from defendant, particularly as part of an ongoing commitment with provisions allowing for exclusive distribution in many locations. In this regard, under a broad understanding of investment, Webasto's ongoing purchases of products from defendant could be viewed as a form of investment by Webasto in defendant that would provide funds for defendant's continued and perhaps expanded production of products, with Webasto realizing a profit from this investment by purchasing and re-selling the products. Thus, viewing the evidence in a light most favorable to plaintiff as required in this summary disposition context, *Greene, supra* at 507, there was a genuine issue of material fact as to whether Webasto invested in defendant within the meaning of the Letter Agreement and, thus, whether there was a "Transaction" under the agreement entitling plaintiff to a fee from defendant.

Although the sales agreement between defendant and Webasto was signed more than 24 months after plaintiff and defendant signed the Letter Agreement, this fact does not make it clear as a matter of law that sales under the sales agreement are not subject to the payment of a fee by defendant to plaintiff. It is true that the Letter Agreement includes a provision that a fee would be payable "if a Transaction with the Investor [Webasto] is completed within twenty-four (24) months from the date of execution of this Fee letter agreement herein." This requirement that the transaction occur within 24 months from the date of the Letter Agreement is a condition precedent because it "'is a fact or event that the parties intend must take place before there is a right to performance.'" *Real Estate One v Heller*, 272 Mich App 174, 179; 724 NW2d 738 (2006), quoting *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 350; 605 NW2d 360 (1999).

Michigan law indicates that where parties to a contract include a condition precedent that requires action by one of the parties for its fulfillment, that party implicitly agrees not to attempt to inappropriately avoid occurrence of the condition precedent:

> Where a contract is performable on the occurrence of a future event, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event, particularly where it is dependent in whole or in part on his own act; and where he prevents the fulfillment of a condition precedent or its performance by the adverse party, he cannot rely on such condition to defeat his liability. * * * Hence, the performance of a condition precedent is discharged or excused, and the conditional promise made an absolute one, where the promisor himself * * * waives the performance. [*Mehling v Evening News Ass'n*, 374 Mich 349, 352; 132 NW2d 25 (1965), quoting *Hayes v Beyer*, 284 Mich 60, 64, 65; 278 NW2d 764 (1938), quoting 13 CJ, Contracts, § 722, p 648.]

In reliance on this principle, the *Mehling* Court affirmed a trial court's refusal to allow the plaintiffs in that case to rely on a condition precedent requiring the parties to agree on compensation to be paid appraisers based on the trial court's finding that the plaintiffs refused to meet with the defendant to agree on fees for the appraisers. *Id*. at 351-352. Similarly, in *Ihlenfeldt v Guastella*, 42 Mich App 384, 390; 202 NW2d 327 (1972), this Court rejected the

plaintiffs' claim that they were entitled to rely on the nonoccurrence of a condition precedent where it involved a matter "over which plaintiffs had some control, and the evidence suggests that they made little or no effort to fulfill the condition."

In the present case, it is apparent that defendant had a significant role in deciding whether to enter into dealings with Webasto that might trigger a duty on defendant's part to pay a fee to plaintiff and the timing of such deals. It is undisputed that Webasto began ordering some products from defendant before the close of the relevant 24-month period, and that the sales agreement was entered shortly after the close of the 24-month period. Therefore, viewing the evidence in a light most favorable to plaintiff, *Greene, supra* at 507, it could reasonably be determined that defendant may have intentionally delayed the signing of the sales agreement in an effort to avoid paying a fee to plaintiff under the Letter Agreement. In other words, a factfinder could reasonably find that with regard to the sales agreement, defendant attempted to improperly avoid the condition precedent that a "Transaction" occur within 24 months of the date of the Letter Agreement, thereby precluding plaintiff from relying on that condition precedent so that defendant would be liable to pay a fee to plaintiff based on the sales agreement although it was signed outside the 24-month period.

There are genuine issues of material fact regarding whether defendant breached the Letter Agreement by failing to pay a fee under it to plaintiff. Therefore, we reverse the trial court's grant of summary disposition to defendant and remand this case to the trial court for further proceedings. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Michael J. Talbot
/s/ Bill Schuette